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PRE-APPEAL BRIEF REQUEST FOR REVIEW		Docket Number (Optional) 350013-65	
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		First Named Inventor Ian Baird-Smith	
		Art Unit 3781	Examiner Hylton, Robin Annette
Applicant requests review of the final rejection in the above-identified application. No amendments are being filed with this request. This request is being filed with a notice of appeal. The review is requested for the reason(s) stated on the attached sheet(s). Note: No more than five (5) pages may be provided.			
I am the <input type="checkbox"/> applicant/inventor. <input type="checkbox"/> assignee of record of the entire interest. See 37 CFR 3.71. Statement under 37 CFR 3.73(b) is enclosed. (Form PTO/SB/98) <input checked="" type="checkbox"/> attorney or agent of record. Registration number <u>34,950</u> <input type="checkbox"/> attorney or agent acting under 37 CFR 1.34. Registration number if acting under 37 CFR 1.34 _____		 Signature <u>Barbara A. Wrigley</u> Typed or printed name <u>612-607-7595</u> Telephone number <u>April 8, 2008</u> Date	
NOTE: Signatures of all the inventors or assignees of record of the entire interest or their representative(s) are required. Submit multiple forms if more than one signature is required, see below*.			
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Applicant: Ian Baird Smith et al.

Confirmation No. 9395

Serial No.: 09/445,043

Filing Date: March 20, 2000

Group Art Unit: 3727

Title: APPARATUS AND METHOD FOR
CLOSING OFF THE OPEN END OF A
CONTAINER WITH A REMOVABLE
FLEXIBLE MEMBRANE COVERED
BY A RIGID CAP

Examiner: Robin Annette Hylton

Docket No: 350013-000065

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Barbara A. Wrigley

PRE-APPEAL BRIEF REQUEST FOR REVIEW

Applicants request review of the final rejection dated January 11, 2008 (the "Final Rejection") in the above-referenced application for the reasons set forth in detail below. No amendments are being filed with the request. A Notice of Appeal is also enclosed.

Applicants submit that the rejection of claims 1, 3, 6, 9, 10 and 13 under 35 U.S.C. §102(b) is improper due to clear error. As set forth in detail below, the cited *Sekiguchi et al.* reference (JP 62-122962) does not disclose at least one of the limitations for which it is relied upon by the Final Rejection. Additionally, claim 8 has been rejected under 35 U.S.C. §103 over *Sekiguchi et al.*, claim 11 has been rejected under 35 U.S.C. §103 over *Sekiguchi et al.* in view of *Hardt* (U.S. 4,328,905) and claims 1, 3, 4, 6, 8-10 have been rejected under 35 U.S.C. §103 over *Hiroshi* (JP 6-219464) in view of *Sekiguchi et al.* One skilled in the art would not be motivated to combine *Hiroshi* with *Sekiguchi et al.* Thus, with respect the rejections under §103, a prima facie case of obviousness has not been made.

1. ***Sekiguchi et al.* Does Not Disclose the Limitations of the Claims and Therefore is Not Anticipated by *Sekiguchi et al.* under 35 U.S.C. §102(b).**

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Applicants submit that the Final Rejection is erroneous in its assertion that at least one of the recited limitations is disclosed by *Sekiguchi et al.* Applicants reiterate the arguments previously provided in the Response dated October 31, 2007 ("October 31, 2007 Response"), which explain that *Sekiguchi et al.* does not disclose that "the laminar member is spaced from the flexible membrane by a distance less than the maximum possible extension of the flexible membrane towards the laminar member," even though the rejection relies on *Sekiguchi et al.* as disclosing this limitation. The second and third pages of the Final Rejection state:

FIG 1 depicts the rigid cap attached to the container with an airspace between the flexible membrane 2 and the rigid cap 3. The fourth paragraph on page 4 discloses the expansion and contraction of the airspace 4 prevents rupture of the flexible membrane. The airspace is contracted and expanded by movement of the flexible membrane. It can be *seen* [from FIG. 1] that the lowermost point of the laminar member is spaced from the flexible membrane by a distance less than the maximum possible extension of the flexible membrane towards the laminar member.

A plain reading of the recited excerpt below, fails to disclose the claimed limitation.

If a sealed container that is in the state shown in Fig. 1 is subjected to heat sterilization at 90°C or above or retort sterilization at 110-120°C, the internal pressure of the said air layer and the internal pressure of the glass container are balanced relatively easily through the expansion and contraction of the air layer present inside airtight space (4) and therefore no particularly great force is applied to inner cap (2) and its heat seal part and consequently the seal is not broken.

Moreover, the claimed limitation cannot be *seen* from FIG. 1 as the final Office Action states because the figures in a patent application are not drawn to scale. Rather, when this same case went up on appeal to the Board of Patent Interferences and Appeal, the Board stated that "Since patent drawings are not drawn to scale one cannot determine any details about the spacing except that a space exists." BPAI Decision, April 23, 2007, page 5, lines 8-11.

As explained in the Applicant's October 31, 2007 Response *Sekiguchi et al.* disclose that a space exists between the cap and the flexible membrane. However, *Sekiguchi et al.* does not disclose the precise relationship between the laminar member and the flexible membrane, i.e. that the "laminar member is spaced from the flexible membrane by a distance less than the maximum possible extension of the flexible membrane towards the laminar member." The Final Rejection fails to recognize that the foregoing limitation is not disclosed by *Sekiguchi et al.* and

cannot be *seen* in FIG. 1. For these reasons, which Applicant has pointed out in its October 31, 2007 Response, claims 1, 3, 6, 9 10 and 13 are not anticipated by *Sekiguchi et al.* and the rejection should be withdrawn.

2. *Sekiguchi et al.* Does Not Disclose the Limitations of Independent Claim 1 and Therefore Neither Claim 8 Nor Claim 11 Is Obvious.

As discussed in the October 31, 2007 Response if a reference does not disclose the limitation in an independent claim the claims depending therefrom are not obvious in view of the same reference. *Sekiguchi et al.* does not disclose that the "laminar member is spaced from the flexible membrane by a distance less than the maximum possible extension of the flexible membrane towards the laminar member" and therefore, *Sekiguchi et al.* alone cannot make obvious a resiliently deformable member comprised of a foamed material secured to the rigid cap and *Sekiguchi et al.* in view of *Hardt* does not make a lifting tab hingedly secured to the flexible member obvious.

3. *Claims 1, 3, 4, 6, 8-10 and 13 Are Not Unpatentable Under 35 U.S.C. §103(a) over Hiroshi (JP 6-219464) In View Of Sekiguchi et al.*

Applicants submit that the Final Rejection is erroneous in its assertion that Claims 1, 3, 4, 6, 8-10 and 13 are unpatentable under 35 U.S.C. §103(a) over *Hiroshi* in view of *Sekiguchi et al.* The Board of Patent Appeals and Interferences has already determined that the *Hiroshi* reference does not make the claimed invention obvious. BPAI Decision, April 23, 2007. The Final Rejection acknowledges this. Final Rejection, page 4, lines 5-7. However, the Final Rejection states that it is known from *Sekiguchi et al.* to provide a container assembly in which the laminar member is spaced from the flexible membrane by a distance less than the maximum possible extension of the flexible membrane toward the laminar member to provide a container liner seal that is less likely to rupture due to pressure within the sealed container. Applicants contend that no such limitation is know or suggested by *Sekiguchi et al.*

Sekiguchi et al. disclose that an air space exists between the cap top wall and the flexible membrane.

If a sealed container that is in the state shown in Fig. 1 is subjected to heat sterilization at 90°C or above or retort sterilization at 110-120°C, the internal pressure of the said air layer and the internal pressure of the glass container are balanced relatively easily through the

expansion and contraction of the air layer present inside airtight space (4) and therefore no particularly great force is applied to inner cap (2) and its heat seal part and consequently the seal is not broken.

Sekiguchi et al. does not disclose any particular airspace but does disclose it can be varied.

FIG. 2 shows inner cap (2) in which central part (7) projects downwards. In this case, airtight space (4) can be made bigger than that in the sealed container shown in FIG. 1 and therefore it can withstand larger variation in pressure.

Thus, *Sekiguchi et al.* does not disclose nor make obvious the very precise relationship between the laminar member and the flexible member claimed by Applicants. The Final Rejection states that the flexible membrane of *Sekiguchi et al.* can clearly deflect in a direction opposite that which is shown and since the laminar member includes a downwardly projecting indented portion that protrudes into the air space, the distance between this portion of the laminar member and the flexible membrane is less than the distance between the central portion of the laminar member and the flexible membrane. Applicants contend that the Final Rejection impermissibly relies on hindsight gleaned from Applicants disclosure and claimed limitation. Finding obviousness through hindsight, i.e. after the fact of the invention and with the teachings of the inventor available, is impermissible and refuted by the objective indicia of nonobviousness. *Al-Site Corp. v. VSI Int'l Inc.*, 50 USPQ2d 1161 (Fed. Cir. 1999).

Not only does *Sekiguchi et al.* fail to disclose the claimed relationship between the laminar member and the flexible membrane, there is nothing in FIG. 1 that shows or suggests what the maximum extension of flexible membrane 2 would be if extended in a direction towards the closure of the container. The possible variation in spacing disclosed by *Sekiguchi et al.* does not make the claimed invention obvious because one skilled in the art would need to conduct undue experimentation regarding an infinite number of spacing possibilities with no reasonable expectation of success. "Obviousness does not require absolute predictability but a reasonable expectation of success is necessary." *Amgen, Inc. v. Chugai Pharmaceutical Co.*, 18 USPQ2d 1016 (Fed. Cir. 1991). A prior art suggestion for virtually endless experimentation does not make a prima facie case of obviousness. *In re Dow Chemical Co.*, 837 F.2d 469, 473, 5 USPQ2d 1529, 1532 (Fed. Cir. 1989).

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At best, in view of the disclosure of *Sekiguchi et al.*, one skilled in the art might find it obvious to try various combinations of spacing. However, this is not the standard of 35 U.S.C. §103(a). *In re Gieger*, 815 F.2d 686, 688, 2 USPQ2d 1276, 1278 (Fed. Cir. 1987). Applicants claim a very precise limitation that is neither suggested nor made obvious by the theoretical combination of *Hiroshi* and *Sekiguchi et al.* as stated in the Final Rejection. All claim limitations must be considered, especially when missing from the prior art. In *In re Fine*, 5 USPQ2d 1596 (Fed. Cir. 1988), the examiner ignored a material, claimed limitation that was absent from the prior art and the court found no prima facie case of obviousness. In variant form, the Federal Circuit found that a reference does not render a claimed combination obvious when a material, claimed limitation was absent from the reference.

The mere absence [from the reference] of an explicit requirement [of the claim] cannot reasonably be construed as an affirmative statement that [the claimed requirement is obvious.]

In re Evanega, 4 USPQ2d 1249 (Fed. Cir. 1987)

Accordingly, a prima facie case of obviousness has not been made and the rejection over Hiroshi in view of *Sekiguchi et al.* should be withdrawn.


CONCLUSION

Applicants respectfully request that the rejections of claims 1, 3, 4, 6, 8, 9-11 and 13 be withdrawn and the application proceed to allowance. It is believed that no fees are due but if any fees are deemed to be due in connection with the filing of this paper, the Commissioner is authorized to charge any such fees to Deposit Account No. 50-1901 (Reference 350013-65).

Dated: April 10, 2008

Respectfully submitted,

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APPENDIX A - CLAIM AMENDMENTS

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Docket No.: 350013-65

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1. (Previously Presented) A container assembly comprising a closure for an open-ended container, and an open-ended container, the container assembly comprising:

- (i) a flexible membrane for closing the open end of the container;
- (ii) an adhesive seal between the flexible membrane and the container;
- (iii) a rigid cap having a resiliently deformable member juxtaposed to the flexible membrane such that when the cap is in use, the flexible membrane is pressed against the container in the vicinity of the seal, thereby reinforcing the seal sufficiently to withstand high pressures which are generated from cooking the contents of the container;
- (iv) the rigid cap further having a first cam and follower pair, which when in use is engaged with a second cam and follower pair located on the container neck, relative movement between the first and second cam and follower pairs in a predetermined direction causes the rigid cap and the container neck to approach one another, thereby increasing the pressure exerted by the resiliently deformable member on the flexible membrane; and
- (v) the rigid cap further having a laminar member and an annular skirt, the skirt extending downwardly from the laminar member, and the second cam and follower pair is secured on an upper wall of the skirt,

wherein the laminar member is spaced from the flexible membrane by a distance less than the maximum possible extension of the flexible membrane towards the laminar member.

2. (Cancelled)

3. (Previously Presented) A container assembly according to Claim 1 wherein the first and second cam and follower pairs include co-operating screw threads formed respectively on the container neck and the rigid cap.

4. (Previously Presented) A container assembly according to Claim 1 further having an annular flange, the resiliently deformable member is substantially congruent with the flange, and wherein the rigid cap is in place over the container, the resiliently deformable member presses the flexible membrane against the flange.
5. (Cancelled)
6. (Previously Presented) A container assembly according to Claim 1 wherein the laminar member is a circular disc, and the skirt extends from the outer periphery thereof.
7. (Cancelled)
8. (Previously Presented) A container assembly according to Claim 1 wherein the resiliently deformable member comprises a foamed material secured to the rigid cap.
9. (Previously Presented) A container assembly according to Claim 1 wherein the flexible membrane comprises a metal foil adhesively securable on the container neck.
10. (Previously Presented) A container assembly according to Claim 4 wherein the rigid cap is shaped for use with the container neck which is generally cylindrical in shape.
11. (Previously Presented) A container assembly according to Claim 1 including a lifting tab hingedly secured to the flexible membrane and is comprised of the same material as that of the flexible membrane.
12. (Cancelled)
13. (Previously Presented) A container assembly according to Claim 1 wherein the rigid cap supports the body of the can in a radial direction.

14. (Withdrawn) A method of closing a container with a closure to form a container assembly according to Claim 1 comprising the steps of:

(i) adhesively securing said flexible membrane on the open end of a the neck of the container, thereby forming said seal;

(ii) engaging the cam and follower of a said rigid cap and the container neck, with one another; and

(iii) moving the rigid cap and the container neck relative to one another to cause relative movement between the cam and the follower in the predetermined direction, thereby causing the resiliently deformable member to press the flexible membrane against the container in the vicinity of the seal sufficiently to maintain the seal against pressures generated in the container on cooking of its contents.

15. (Withdrawn) A method according to Claim 14 including the step of securing the flexible membrane on the open end of the said container neck by use of a heat-sealing method such as heat contact, ultrasonic, induction or hot air heating.

16. (Withdrawn) A method according to Claim 14 wherein the step of moving the rigid cap and the container neck relative to one another includes rotating the rigid cap and the container relative to one another.

17. (Withdrawn) A method according to Claim 14 wherein the step of adhesively securing the flexible membrane on the open end of the container neck includes the sub steps of applying adhesive material to the flexible membrane and/or the container neck; engaging the flexible membrane and the container neck with one another to define the seal; and curing the adhesive material.

18. (Withdrawn) A method according to Claim 17 wherein the substep of curing the adhesive material includes heating thereof.

19-21. (Cancelled)

22. (Withdrawn) A method according to Claim 14 including the steps of:
- Adding food to the container through a second open end of the container which is opposite said open end closed by said closure;
 - closing said second open end by a conventional can end;
 - heating said food within said container to cook said food; and
 - preventing rupture of said flexible membrane due to internal container pressure caused by said heating by the presence of said laminar member of said cap.